IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 727

DONALD J. VALE,

Appellant,

versus

LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

BRIEF FOR APPELLANT

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Opinion Below

The opinion of the Supreme Court of Louisiana is reported at 252 La. 1056, 215 So.2d 811 (A 112 ff).

Jurisdiction

The Supreme Court of Louisiana rendered its judgment herein on November 12, 1968 (A 112); rehearing was denied on December 16, 1968, 215 So.2d 811 (A 131); and the notice of appeal to this Court was filed in the Supreme Court of Louisiana on January 28, 1969. A 132. The notice of appeal presented three questions:

1—Whether the punishment prescribed by Louisiana RS 40:962 may constitutionally be enhanced under Louisiana RS 15:529.1 (the multiple-offender statute);

2—Whether Article 225 of the Louisiana Code of Criminal Procedure, authorizing an arresting officer to seize

incriminating articles which the person arrested has about his person, is valid *vis-à-vis* the Fourth and Fourteenth Amendments to the Constitution of the United States, as applied in this case to authorize a general exploratory search of a house outside of which appellant was arrested; and

3—Whether use against appellant, of evidence seized during such a search, violates the Fourteenth Amendment to the Constitution of the United States. A 132-33.

This Court entered orders postponing consideration of the question of its jurisdiction to the hearing of the case on its merits, limiting review to the second and third (search-and-seizure) questions, and permitting appellant to proceed *in forma pauperis* A 134; 396 US 813.*

It is submitted that at least the second question is properly presented by appeal to this Court under 28 USC §1257 (2), since the jurisdictional test is the validity *vel non* of the State statute, not necessarily on its face, but as applied in the case under review. *Dahnke-Walker Co.* v. *Bondurant,* 257 US 282, 289.

The Supreme Court of Louisiana cited the State statute at issue as authority for the search and seizure here involved (A 113-14), and its decision adverse to appellant necessarily sustained the validity of the statute as applied in this case. *Cf. Lawrence* v. *State Tax Commission,* 286 US 276, 282.

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* In a supplemental order, this Court appointed undersigned counsel to represent appellant as his attorney on his appeal to this Court. A 134; 396 US 883.

The third question, that as to the constitutionality of a conviction based on evidence invalidly seized (which falls fairly within the ambit of the second question in any event) may also be presented and considered on the appeal, even though, considered alone, it might be reviewable only by certiorari. See *Prudential Ins. Co.* v. *Cheek*, 259 US 530, 547; *Flournoy* v. *Wiener*, 321 US 253, 263; *Mishkin* v. *New York*, 383 US 502, 512.[1]

If this Court should conclude that the disposition of the second question by the Supreme Court of Louisiana was not sufficiently explicit to vest appellate jurisdiction in this Court, the Court may nevertheless review the search-and-seizure issue as on certiorari under 28 USC §§1257(3) and 2103. *Garrity* v. *New Jersey*, 385 US 493, 495-96. The granting of certiorari is justified by the conflict between the decision below and the holdings of this Court in *Von Cleef* v. *New Jersey*, 395 US 814 and *Shipley* v. *California*, 395 US 818.[2]

Constitutional and Statutory Provisions Involved

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, sup-

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[1] "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co.* v. *United States*, 251 US 385, 392.

[2] The decision below is also in conflict with this Court's holding in *Chimel* v. *California*, 395 US 752, but, as noted in the *Argument* below, it is not necessary in this case, to reach the question of retroactivity of the *Chimel* holding.

ported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourth Amendment, Constitution of the United States

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

Fourteenth Amendment, Constitution of the United States, §1

"A peace officer making an arrest shall take from the person arrested all weapons and incriminating articles which he may have about his person . . ."

Article 225, Louisiana Code of Criminal Procedure.

Question Presented

Whether a state statute authorizing an arresting officer to seize incriminating articles which the person arrested has about his person, may be so applied, without infringing the Fourth and Fourteenth Amendments to the Constitution of the United States, (1) as to authorize a general exploratory search of a house outside of which the apprehended person was arrested, conducted without a search warrant in the absence of any justifying emergency, and (2) as to authorize the introduction in evidence, against appellant, of narcotic drugs seized in the course of such a search.

Statement of the Case

On April 24, 1967, three New Orleans narcotics-division police officers took up a watch in their automobile near the house where they understood appellant resided. They were armed with two warrants or capiases which had been issued for appellant's arrest pursuant to a recommended increase in the amount of the bond on which he had been released on a pending narcotics charge. A 60, 67-68, 72.[3] The officers had no search warrant. A 26, 34, 42.

As they were watching the house, the officers saw a person, known to them to be a narcotics addict, drive up and blow his horn. Appellant came out of the house, conversed briefly with the person in the automobile, returned to the house, and then came back out to the vehicle. Suspecting that a narcotics transaction was taking place, the officers drove their car toward the other automobile, the driver of which then attempted to drive off; but the police officers blocked the other vehicle, which thereupon stopped, and they saw its driver put something into his mouth. A 60, 72-73, 87-88.

As appellant was returning toward the house, one of the officers arrested him. A 60-61, 88.[4] Over appellant's protest (A 64), the officers then took him into the four-room house, and conducted a general search of the premises. A

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[3] Unbeknownst to the officers, the increase in the bond had already been canceled. A 107-108.

[4] There is some conflict in the evidence as to whether appellant was arrested at the curb next to the automobile, fifteen to thirty-five feet from the house (A 11, 32, 61), or near the steps in front of the house. A 21.

61-62, 73-74.[5] In the course of the search, during which appellant's mother (who owned the house) and brother arrived, the officers found and seized some heroin capsules in the pockets of a white coat and a brown suit hanging inside a closed locker in the rear bedroom. Appellant admitted to the officers that the capsules and suit were his. A 62, 69, 80, 85.

These capsules were introduced against appellant at his trial on the charge of possessing them. A 66, 76-77. Appellant filed a bill of exceptions to the denial of his motion to suppress, and of his objection to the introduction of this evidence, on the ground that the capsules were the fruits of a search which infringed his rights under "the 4th and 14th amendments of the Constitution of the United States of America". A 37, 40-45, 118, 119.[6]

Appellant was convicted (A 7), and appealed to the Supreme Court of Louisiana, raising the search-and-seizure question in his brief filed in that Court. A 111. The appellate Court affirmed the conviction, citing the Louisiana

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[5] Appellant's mother told the officers that appellant did not live in the house (A 69), but the officers testified that appellant conceded to them that the house was his place of residence. A 68.

[6] The trial court stated, as an additional ground for overruling the motion and objection, that appellant, having disclaimed residence in the house (A 37), had no standing to object to the search. A 50. The court recognized that the "federal courts" had held to the contrary, but stated that "this proposition, as set forth by the Federal Courts, in the opinion of this Court, is untenable when the constitutional provisions are taken into consideration". A 44. In any event, being lawfully at the premises, appellant did have standing to object, under this Court's decisions in *Mancusi* v. *DeForte*, 392 US 364, 368-69, and *Jones* v. *United States*, 362 US 257, 267. Neither the State, nor the Supreme Court of Louisiana, questioned appellant's standing to object; and that Court held expressly that the ruling of the "trial judge . . . was not based on that ground as contended by counsel . . ." A 118.

statute authorizing an arresting officer to take from the person arrested all incriminating articles which he has about his person (Code of Criminal Procedure, Article 225), and holding that the warrantless search of the house incident to the arrest outside of it was reasonable, and did not violate appellant's rights under the Fourth and Fourteenth Amendments. A 112-130.

Summary of Argument

Under the Fourth and Fourteenth Amendments, police officers may not conduct a warrantless general exploratory seach of a house conducted pursuant to arrest of a person outside the house, in the absence of any justifying emergency; and the fruits of such a search may not be introduced in evidence in a state-court criminal prosecution of the person so arrested.

ARGUMENT

—a—

The Fourth Amendment in State-Court Proceedings

In *Mapp* v. *Ohio*, 367 US 643 and in *Ker* v. *California*, 374 US 23, this Court held that the Due-Process Clause of the Fourteenth Amendment forbids the use in state-court criminal prosecutions, of evidence obtained by a search violative of Fourth Amendment standards. The issue in this case accordingly is whether the instant search conformed to those standards.

The search was obviously outside the bounds—the extent of the arrested person's reach—fixed by this Court in *Chimel* v. *California, supra*, 395 US 752.

It is not, however, necessary to reach the question of retroactivity of the *Chimel* holding as to "cases still subject to direct review by this Court",[7] since it is clear that the search and seizure also violated the constitutional principles ante-dating that holding, on which the opinion in that case was in any event based.

—b—

Juridical Background of the Fourth Amendment

In light of the fact that, with the exception of the *Chimel* case, summary disposition has been made of recent cases involving constitutional validity of search-and-seizure questions, and of Mr. Justice Black's expressed dissent in the *Von Cleef*[8] and *Shipley*[9] cases "from reversal and remand . . . without a hearing", it may be in order to recall briefly, at this point, the background of the fundamental principles at issue in those cases as in the case at bar.

In his dissent in *United States* v. *Rabinowitz,* 339 US 56, 69-70, *passim,* Mr. Justice Frankfurter suggested that one must recognize "the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution"; and he went on to state that "the clue to the meaning and scope of the Fourth Amendment is John Adams' characterization of Otis' argument against search by the police that

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[7] Mr. Justice Harlan, concurring in *Von Cleef* v. *New Jersey, supra,* 395 US 814, 817.

[8] *Von Cleef* v. *New Jersey,* 395 US, 814, 816. Mr. Justice White joined in this dissent.

[9] *Shipley* v. *California,* 395 US 818, 820 (1969). Mr. Justice White dissented on the same ground.

'American independence was then and there born'. . . . It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed 'unreasonable' ".

And in the same case, Mr. Justice Black, dissenting, expressed much the same thought: "The Framers of the Fourth Amendment must have concluded that reasonably strict search and seizure requirements were not too costly a price to pay for protection against the dangers incident to invasion of private premises . . . " *Id.*, at p. 68.

In *Gouled* v. *United States,* 255 US 298, 304, the safeguards of the Fourth Amendment were characterized "as of the very essence of constitutional liberty", declared to be "as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen".

This same thought was expressed even more forcefully by Mr. Justice Frankfurter in his dissent in *Harris* v. *United States,* 331 US 145, 163, in stating that "the historic background" of the Fourth Amendment "is respect for that provision of the Bill of Rights which is central to enjoyment of the other guarantees of the Bill of Rights. How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar . . . ? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather, be turned up?"

And in *Go-Bart Co.* v. *United States,* 282 US 344, 357, this Court said that "since before the creation of our government, such searches have been deemed obnoxious

to fundamental principles of liberty. . . . The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

In the *Harris* case (331 US at p. 198), Mr. Justice Jackson, dissenting, postulated that while "this, like each of our constitutional guarantees, often may afford a shelter for criminals . . . . the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught."

"The protection of the Fourth Amendment extends to all equally—to those justly suspected or accused, as well as to the innocent", *Agnello* v. *United States,* 269 US 20, 32; *Go-Bart Co.* v. *United States, supra,* 282 US at p. 357; *Marron* v. *United States,* 275 US 192, 196; *United States* v. *Lefkowitz,* 285 US 452, 464. And of course an unconstitutional search and seizure does not become valid simply because it discovers contraband: "As the Court said in *United States* v. *Di Re,* 332 US 581, 595 (1948), 'a search is not to be made legal by what it turns up. In law it is good *or bad* when it starts and does not change character from' what is dug up subsequently." *Ker* v. *California, supra,* 374 US at p. 41. (Emphasis by the Court.)

In his dissent in the *Harris* case (331 US at p. 156, *passim*), Mr. Justice Frankfurter wrote that "the prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends. The implications of such encroachment, however, reach far beyond the thief or black marketeer."

"But it is precisely because the appeal to the Fourth Amendment is so often made by dubious characters that its infringements call for alert and strenuous resistance."

The underlying philosophy of the strong safeguards of the Fourth Amendment, and of the broad application of its constitutional principles, was perhaps best expressed by Mr. Justice Murphy, dissenting in the same case (331 US at pp. 193-94), when he said that "freedom from unreasonable search and seizure is one of the cardinal rights of free men under our Constitution. That freedom belongs to all men, including those who may be guilty of some crime. The public policy underlying the constitutional guarantee of that freedom is so great as to outweigh the desirability of convicting those whose crime has been revealed through an unlawful invasion of their right to privacy. Lawless methods of law enforcement are frequently effective in uncovering crime, especially where tyranny reigns, but they are not to be countenanced under our form of government. It is not a novel principle of our constitutional system that a few criminals should go free rather than that the freedom and liberty of all citizens be jeopardized."

—o—

Contemporary Jurisprudence

Appellant was arrested on the sidewalk in front of the house. The house was entered without a search warrant, over his protest. The search of the house was not made to find any particular object, but was a general exploratory search.[10] The heroin capsules were not in plain view,

[10] In *United States* v. *Lefkowitz, supra,* 285 US at pp. 465, 467, this Court said that the searches involved in that case "were ex-

but were hidden in the pockets of garments hanging inside a locker. There was no emergency of any kind.

This Court held, in *Shipley* v. *California, supra,* 395 US 818, 819-820, that a search of the petitioner's house without a warrant, following his arrest "as he alighted from his car", which "was parked outside the house and 15 or 20 feet away from it", was an unconstitutional search under its decisions ante-dating the *Chimel* case: "The Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person *outside* his home and then take him inside for the purpose of conducting a warrantless search. On the contrary, 'it has always been assumed that one's house cannot lawfully be searched without a search warrant except as an incident to a lawful arrest *therein.*'" (Emphasis by the Court.) Accord: *James* v. *Louisiana,* 382 US 36; *Kremen* v. *United States,* 353 US 346; *Stoner* v. *California,* 376 US 483.[11]

So too, as this Court held in *Von Cleef* v. *New Jersey, supra,* 395 US 814, its decisions ante-dating the *Chimel* case had never sustained a general exploratory search, without a warrant, of rooms of a house beyond the area under the immediate control of the person arrested therein, and such a search also is unconstitutional under prior deci-

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ploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime"; and the Court held that "an arrest may not be used as a pretext to search for evidence". To the same effect: *Go-Bart Co.* v. *United States, supra,* 282 US 344. In *United States* v. *Rabinowitz, supra,* 339 US at p. 62, this Court cited the *Go-Bart* and *Lefkowitz* cases as having "condemned general exploratory searches, which cannot be undertaken by officers with or without a warrant".

[11] "It would hardly be suggested that such a search could be made without warrant if Harris had been arrested on the street." Frankfurter, J., dissenting in *Harris* v. *United States, supra,* 331 US at p. 164.

sions. Accord: *Go-Bart Co.* v. *United States, supra,* 282 US 344.

In *Chimel* v. *California, supra,* 395 US 752, 768, this Court held that its decisions in *United States* v. *Rabinowitz* and *Harris* v. *United States* "are no longer to be followed", insofar as they are inconsistent with the *Chimel* holding.[12] In any event, the search involved in the *Rabinowitz* case was sustained only as to specified objects "which were thought upon the most reliable information to be in the possession of and concealed by" the person arrested in the premises of which he had exclusive and immediate possession and control; and, as noted above, this Court was careful to point out in that case, that "general exploratory searches . . . cannot be undertaken by officers with or without a warrant". 339 US at 62, 63.[13]

The only exception, noted by this Court in *Shipley* v. *California,* is a search prompted by an emergency. The Court doubtless had reference to the hot-pursuit search for an armed robber involved in *Warden* v. *Hayden,* 387 US 294, or the search pursuant to a shot and a cry for

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[12] There were four dissents in the *Harris* case and three in *Rabinowitz.* In his dissent in the latter case (339 US at p. 75); Mr. Justice Frankfurter pointed out that the major premise of the majority opinion—"that an arrest creates a right to search the place of arrest—finds support in decisions beginning with *Weeks* v. *United States,* 232 US 383. These decisions . . . merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision. This progressive distortion is due to an uncritical confusion . . ."

[13] The holding in *Marron* v. *United States, supra,* 275 US 192, suggested to have sanctioned a general search (under a search warrant), was explained in *Go-Bart Co.* v. *United States, supra,* 282 US at 358, as having been based on the fact that the records seized "were visible and accessible and in the offender's immediate custody" and "there was no . . . general search or rummaging of the place".

help postulated in *McDonald* v. *United States*, 335 US 451, 454. No such (nor any other) emergency existed in the case at bar.

Specifically, this Court has held that "belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant" incident to an arrest outside the house. *Agnello* v. *United States, supra*, 269 US 20, 33.[14]

Conclusion

Appellant was convicted on the basis of evidence obtained by unreasonable search and seizure contrary to the Fourth and Fourteenth Amendments. It is respectfully submitted that the judgment of the Supreme Court of Louisiana must be reversed.

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[14] This holding "has never been questioned in this Court". *Stoner* v. *California, supra*, 376 US 483, 487.